

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF OHIO
3 EASTERN DIVISION AT CLEVELAND

4 -----X
5 IN RE: : Case No. 1:17-md-2804
6 :
7 NATIONAL PRESCRIPTION : (Pages 1 - 26)
8 OPIATE LITIGATION :
9 : December 1, 2023
10 :
11 -----X

12 TRANSCRIPT OF TELEPHONIC STATUS CONFERENCE

13 HELD BEFORE THE HONORABLE DAN AARON POLSTER
14 SENIOR UNITED STATES DISTRICT JUDGE

15 Official Court Reporter:

16 Donnalee Cotone, RMR, CRR, CRC
17 Realtime Systems Administrator
18 United States District Court
19 801 West Superior Avenue
20 Court Reporters 7-189
21 Cleveland, Ohio 44113
22 216-357-7078
23 donnalee_cotone@ohnd.uscourts.gov

24 Proceedings recorded by mechanical stenography; transcript
25 produced by computer-aided transcription.

1 APPEARANCES:

2

3 For Plaintiffs' Executive Committee (PEC):

4

PETER H. WEINBERGER, ESQ.

5

Spangenberg, Shibley & Liber LLP
1001 Lakeside Avenue, Suite 1700
1900 East Ninth Street
Cleveland, OH 44114
216-696-323

6

7 For OptumRx, Inc:

8

BRIAN D. BOONE, ESQ.

9

Alston & Bird LLP
Suite 300
Vantage South End
1120 South Tryon Street
Charlotte, NC 28203-6818
704-444-1106

10

11

12

For Express Scripts:

13

PATRICK J. KING, ESQ.

14

Quinn, Emanuel, Urquhart &
Sullivan LLP
Suite 500
711 Louisiana Street
Houston, TX 77002
713-221-7222

15

16

17

ALSO PRESENT:

David Cohen, Special Master

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1 MORNING SESSION, FRIDAY, DECEMBER 1, 2023

2 (Proceedings commenced at 8:32 a.m.)

3 - - -

4 THE COURT: All right. Good morning.

08:32:16 5 Do we have everyone on that we need?

6 JUDICIAL ASSISTANT: It's difficult to take
7 attendance because there's so many. But they will identify
8 themselves before they talk. And the court reporter is on.

9 THE COURT: Okay. All right. Well, this is a
08:32:32 10 telephonic status conference in the Opioid MDL with the
11 lawyers involved in the four PBM bellwethers.

12 The parties have submitted proposed case management
13 orders. They agree on some things, disagree on a number of
14 them. Before I just decide what we're going to do, I
08:32:54 15 thought it would be helpful to have a conversation. I've
16 got a few questions, and then I'll let people speak.

17 All right. The first question I have, lawyers for the
18 PBMs had said some time ago they plan to file motions to
19 disqualify some plaintiffs' counsel in these bellwethers.

20 Is that still something under consideration, and if
21 so, I'm going to set a very prompt, you know, schedule to
22 file those and have responses and replies.

23 MR. BOONE: Your Honor, this is Brian Boone
24 from Alston & Bird for OptumRx.

08:33:39 25 The answer is yes, we still intend to move to

1 disqualify certain counsel and stand ready to do so on your
2 schedule.

3 THE COURT: All right. Well, look, Brian,
4 this is -- I strongly suggest -- I don't know, are -- if
08:33:54 5 clients are on. I think in the future -- if they're not, I
6 think in the future anytime I have a conference or a
7 hearing, we should have client reps from both sides. This
8 should be a decision your clients make because there will be
9 ramifications if you file this motion -- or these motions,
08:34:18 10 whatever I end up doing.

11 I've been managing this litigation for, I don't know,
12 at least almost six years, and it only works -- we've got
13 the best lawyers in the country. It only works if the
14 lawyers can at the same time vigorously represent their
08:34:41 15 clients, but also cooperate in moving this litigation
16 forward. And we've been able to do that.

17 Your clients need to understand if they file these
18 motions, it will be very difficult to maintain that level of
19 professional cooperation, and that will clearly have
08:35:08 20 negative repercussions for your clients. I don't need to
21 spell it out. But if they're not listening, you ought to
22 explain to them exactly what I mean.

23 MR. BOONE: Understood, Your Honor.

24 THE COURT: We just went through, in my
08:35:25 25 opinion, a needless exercise that just consumed private

1 resources and judicial resources. So they should think long
2 and hard before filing these motions. If they do, we'll
3 deal with them. They're not going to delay this case one
4 iota. We'll be litigating that alongside of litigating the
08:35:49 5 merits of the case. And all the lawyers you're seeking to
6 disqualify will be litigating and doing whatever they need
7 to do. We're not going to delay, you know, how these court
8 case are going to proceed by one minute. And all it's going
9 to do is make everything that everyone needs to do a lot
08:36:08 10 more difficult and complicated in the months ahead. But
11 that's your decision to make, so --

12 MR. KING: Judge --

13 THE COURT: Yes.

14 MR. KING: Judge, sorry. This is Patrick King
08:36:19 15 for Express Scripts.

16 Just for the record, on behalf of Express Scripts, as
17 things currently stand, we don't intend to file any motions
18 for disqualification, but would reserve our right to do so
19 later based upon new information.

20 THE COURT: All right. Well --

21 MR. BOONE: And, Judge, this is Brian Boone
22 again for OptumRx.

23 Understood. I'll pass along your message. I'm not
24 sure if the client rep is on this morning.

08:36:46 25 And just to give you some sense, we're not intending

1 to move to disqualify the entire PEC. For instance, we
2 would move to disqualify certain counsel who we think have
3 clear, ethical conflicts. So -- and we understand that
4 we're going to be litigating apace alongside those motions.

08:37:03 5 THE COURT: All right. Well, again, I think,
6 Brian, you should really discuss this with your client,
7 particularly since the other defendant is not joining,
8 whether this is a wise thing to do.

9 All right. This is what I'm going to do. If -- only
08:37:19 10 motions to disqualify are to be filed by two weeks from
11 today. That's the 15th. I'm not suggesting -- in fact, I'm
12 encouraging you not to, but if you're going to file them,
13 that's the deadline.

14 Given the holiday, I'll give the plaintiffs longer
08:37:42 15 than normal to respond.

16 Why don't -- how's January the 10th to respond?

17 MR. WEINBERGER: Your Honor, this is
18 Pete Weinberger.

19 That's fine for us.

08:38:07 20 THE COURT: All right. And then I'll give ten
21 days for reply, which would be January the 20th. And, you
22 know, there may need to be discovery, and if so, we'll map
23 that out. I'll -- I guess that will depend on what the
24 plaintiffs say in their response. But you should address
08:38:29 25 whether, you know, you think you need discovery and what

1 that would be. And I typically -- if I think there's any
2 question whether discovery is needed to decide a motion,
3 I'll usually allow it, so . . .

4 Okay. All right.

08:38:45 5 JUDICIAL ASSISTANT: Judge, are you expecting
6 these deadlines to be at noon or at the end of the business
7 day?

8 THE COURT: Yeah, let's make it at noon.
9 That's probably a good idea for everything.

08:39:01 10 All right. The second thing, it would be helpful for
11 me to know. I know the plaintiffs are going to -- we need
12 to set a deadline for filing amended complaints. Whether
13 the -- I don't know if the parties specifically addressed
14 that.

08:39:21 15 When are the plaintiffs planning to file -- I assume
16 you are filing amended complaints. When do you -- well, it
17 would be a motion for leave to file, all right?

18 I've already said, you know, I'm going to allow the
19 filing of amended complaints. Whether I'll allow any
08:39:37 20 particular amendments depends on the objections. I'll have
21 to rule on them. But we'll do it with formality.

22 When are you going to file your motion for leave to
23 amend and attach the amended complaints?

24 MR. WEINBERGER: Your Honor, Pete Weinberger,
08:39:51 25 again.

1 December 15th.

2 THE COURT: Okay. All right. I don't know,
3 maybe I'll set the same schedule -- the same schedule for
4 the other -- the other seems as good as anything. So we'll
08:40:10 5 make it -- unless the PBMs think that's not enough time.
6 You tell me.

7 This would be objecting -- what I want to see is
8 objection to the contents of the amendments. I guess you
9 can in effect -- the literal fact that they're amending, but
08:40:33 10 in my opinion, the Sixth Circuit has already made clear that
11 amendments are permitted -- some amendments are permitted
12 for bellwethers.

13 MR. BOONE: This is Brian Boone again,
14 Your Honor, for OptumRx.

08:40:44 15 That makes sense to me, the schedule that you
16 proposed. So that would mean that our oppositions would be
17 due January the 10th; is that right?

18 THE COURT: Right. Right. If that's okay,
19 we'll be -- it will be easier. Everyone can remember the
08:40:56 20 same dates. So noon on December 15th; January 10th the
21 responses; replies, January 20th. And then I'll work on
22 them.

23 I assume the plaintiffs have a pretty good idea of
24 what cause or cause of action they're going to allege. It
08:41:19 25 might be helpful if we know that. If you haven't decided,

1 well, then, we'll wait to see the amended complaints,
2 proposed amended complaints.

3 MR. WEINBERGER: Your Honor, we're still in
4 the drafting stage.

08:41:35 5 THE COURT: Okay.

6 MR. WEINBERGER: And they're working
7 diligently on that. And so I would hesitate to --

8 THE COURT: Okay. That's fine.

9 MR. WEINBERGER: -- to make a presentation.

08:41:45 10 THE COURT: All right. Then it was more a
11 question.

12 Well, the one thing -- the one critical issue that I'm
13 sure we're going to have to address if the -- if the
14 plaintiffs are proposing to add what I'm going to call
08:42:15 15 dispensing, pharmacy dispensing claims, the kind of claims
16 that we had in Track 3 against Walmart, Walgreens, CVS,
17 inadequate suspicious order monitoring systems, that was the
18 heart of the pharmacy bellwether trial.

19 I know these PBMs both operate mail-order pharmacies
08:42:38 20 as part of their business. The current complaints against
21 them don't allege anything with respect to their mail-order
22 pharmacy business.

23 I really do not want, and never envisioned that these
24 bellwethers against the PBMs would turn into pharmacy -- to
08:43:00 25 replicate the pharmacy trials.

1 I'm concerned that if the plaintiffs add those claims,
2 the defendants are going to want to bring in as third-party
3 defendants all of the pharmacies, the major pharmacies.
4 Those three have already entered into global settlements
08:43:21 5 nationwide, and maybe many others, and the trial is going to
6 be unworkable or unmanageable.

7 So I just want the plaintiffs to think about that.
8 And if you're proposing to do that, you've got to put in
9 your filing why it's essential to do it and how you would
08:43:43 10 propose to manage the trial. Because I have great -- I
11 really don't think it's -- I think it potentially could make
12 the trials unmanageable. And that doesn't serve anyone's
13 purpose. So that's something for the plaintiffs to think
14 about.

08:44:04 15 MR. WEINBERGER: Your Honor, can I just
16 respond for a second? This is Pete Weinberger again.

17 THE COURT: Yes. Yes.

18 MR. WEINBERGER: Yes. We're looking at that
19 issue very seriously, and just to clarify for the record, it
08:44:17 20 has to do with the -- not so much with suspicious
21 monitoring, suspicious order monitoring, which is really a
22 distribution type claim. But rather, it has to do with
23 their corresponding responsibility under the CSA as a
24 dispenser.

08:44:36 25 And, of course, as the Court is aware, there have been

1 discussions in the past with the Court and with the parties
2 about the issue of a duty. What is the duty of the PBMs and
3 their knowledge through their dispensing practices of their
4 corresponding responsibility, and what was happening in this
08:45:04 5 country with respect to dispensing issues associated with
6 all the dispensers goes to their -- to their knowledge, and
7 the foreseeability of their conduct as a whole as PBMs. I
8 don't mean --

9 THE COURT: Well, that's a separate question.

08:45:23 10 I just want to -- I don't want to interrupt, but
11 that's a separate question, and there would be an ability to
12 conduct discovery pertaining to dispensing practices -- with
13 respect to knowledge learned without actually alleging that
14 the PBMs dispensing practices themselves either were part of
08:45:48 15 a RICO conspiracy or contributed to a public nuisance or
16 whatever other theory the plaintiffs have. All right?

17 I understand that knowledge obtained through a portion
18 of their -- of their business can go -- you know, knowledge
19 is knowledge, and it can go to other aspects of what they
08:46:10 20 do. That's different than specifically alleging -- well, as
21 we had in Track 3, that the pharmacies breached their duty
22 of care and their corresponding duty with respect to every
23 time you fill a prescription. And the pharmacist has a
24 corresponding duty with the medical professional on each and
08:46:35 25 every prescription that's dispensed. That was the heart of

1 the Track 3.

2 So, again, that's something that you should think
3 about when you're drafting it. I am just concerned that if
4 there are specific claims, dispensing claims, breach of a
08:46:52 5 corresponding duty when the PBMs dispensed all their
6 millions of prescriptions, we're going to -- this is going
7 to morph back into Track 3, and it potentially would be
8 unworkable. So that's just something to think about.

9 MR. BOONE: Your Honor, this is Brian Boone
08:47:13 10 again from Alston Bird for OptumRx.

11 You're right. And if the plaintiffs want to add
12 dispensing claims against the PBMs mail-order pharmacies, we
13 will want to bring in other pharmacies as defendants. And
14 that's going to be a whole lot of complication for no
08:47:29 15 payoff. Because I can tell you -- and I'm speaking for
16 OptumRx here. I don't have the exact numbers, but we're
17 talking about maybe a .3 percent market share. Not
18 3 percent, .3 percent. We're talking about hundreds of
19 prescriptions, not thousands, over the course of a decade.
08:47:44 20 So not the millions that you were envisioning.

21 MR. KING: And Your Honor, this is Patrick
22 King for Express Scripts.

23 Similarly, we have less than 1 percent market share in
24 each of these bellwether jurisdictions. And just by way of
08:48:00 25 example, in the city of Rochester, there are dozens of

1 pharmacies with larger market share than the Express
2 Scripts' mail-order pharmacies.

3 So I think the problem here you flagged is that by
4 including dispensing claims, it would dramatically expand
08:48:17 5 the scope of these bellwethers.

6 THE COURT: Well, and that's -- I envision
7 that, and I'm not sure that's a wise thing to do. But,
8 again, they -- if they're -- even if we don't have formal
9 dispensing claims in the case, that doesn't mean the
08:48:39 10 plaintiffs can't get discovery as to what the PBMs did as
11 mail-order pharmacies, and what they may have learned while
12 they were doing it, and whether that knowledge bears on
13 other claims.

14 So I see that -- I see this as two distinct issues.
08:48:59 15 One is formal claims in the case, and the second is the
16 scope of discovery. So that's just --

17 MR. WEINBERGER: Your Honor, this is
18 Peter Weinberger.

19 Not to prolong this discussion, -- and we certainly
08:49:18 20 will address this for our motion for leave -- I just want to
21 remind the Court that in CT3, in Track 3, as well as in some
22 of the other litigation, we've addressed the fault of
23 nonparties. If you recall, in CT3, you allowed evidence in
24 about market shares associated with independent pharmacies
08:49:42 25 without bringing them in as defendants.

1 And then the other point I want to make is that --
2 and, you know, I think this is down the road once you make a
3 ruling on the amended complaints -- is that this information
4 that they're providing you about their -- the number of
08:50:05 5 scripts that they actually dispensed and their small market
6 share, I think, is going to have to be the subject of
7 discovery.

I mean, I think we're going to be --

9 THE COURT: Well, I know. I --

08:50:17 10 [Simultaneous crosstalk.]

11 MR. WEINBERGER: -- the dispensing data, so
12 that we can sort through that and determine what they're
13 saying about their market share is, in fact, true.

14 But, again, I think that's for another day, but I just
08:50:29 15 wanted to put that on the record.

16 THE COURT: Well, understood.

17 And I had -- in Track 3, the three major pharmacies
18 had the ability, had they wished to bring in other
19 defendants, they chose not to. But the trial would have
08:50:44 20 been a lot of more complicated had they brought them in. We
21 certainly wouldn't have gotten it done in the six weeks that
22 we did, so . . .

23 All right.

24 MR. BOONE: Your Honor, this is Brian Boone
08:50:55 25 for OptumRx.

1 If I can just add one thing. And I understand that
2 you're saying that there's going to be discovery about the
3 PBMs mail-order pharmacies. And that's fine. But it really
4 is going to show that in each of these bellwether
08:51:10 5 jurisdictions, we're talking about a tiny, tiny market
6 share, almost vanishing.

7 THE COURT: Well --

8 MR. WEINBERGER: And I -- but I think it's
9 important to note, Your Honor -- and, again, this is for
08:51:20 10 down the road -- this goes to the issue of the scope of
11 discovery. And we've -- which we litigated in front of
12 Special Master Cohen extensively. And I would suggest to
13 you that it will be our position that since we're talking
14 about knowledge in the first instance and knowledge related
08:51:42 15 to their duties as dispensers under the CSA, our position is
16 we're not going to be limited to the dispensing statistics
17 or data just for bellwethers. But rather, I think we're
18 going to be -- we should be entitled to see what were their
19 dispensing numbers across the country because that relates,
08:52:04 20 again, to their overall knowledge of how inadequate
21 corresponding responsibility systems can lead to the opioid
22 epidemic. So --

23 THE COURT: Well, that -- look, I'm going
24 to -- we addressed in prior bellwethers, the scope of
08:52:26 25 discovery, and, you know, parties should look at my prior

1 rulings. There're going to be some issues where discovery
2 is going to be potentially nationwide, and others where it's
3 going to be local to the jurisdictions -- you know, the
4 geographic area of each of these four bellwethers. And so
08:52:49 5 we'll have to address that. All right?

6 So we've done that in prior cases, and we'll do that
7 here. Where there's a good reason to make it broader, it
8 will be broader, and when there is not, it won't be. And
9 I'll consider, you know, burden and costs as well.

08:53:10 10 So, you know, the parties should be meeting and
11 conferring on that, and ultimately use Special Master
12 Cohen's help. And if there's a serious dispute, I'll have
13 to decide it.

14 And that leads to another thing. There was a, you
08:53:27 15 know, back and forth from the parties' proposals about the
16 effect of prior rulings, court rulings in the MDL.

17 The PBMs were not party to any of these, you know --
18 the motions, the briefing, the argument, the decisions. So
19 they're not technically bound by them. But on the other
08:53:51 20 hand, they're there. And I think the fairest thing should
21 be that if the same issue comes up, that the PBMs should
22 make a showing as to why my ruling was wrong, or that the
23 facts with respect to them are different and so the rulings
24 should be different, either to say, you know, they'll get a
08:54:21 25 crack at saying that my ruling was wrong if they didn't get

1 a crack at it the first time. And I don't think it would be
2 fair for me to say, well, too bad. They get a crack to show
3 why it was wrong, or to say, you know, whether you were
4 right or wrong, the facts with respect to defendant X or Y
08:54:41 5 is not the same as the facts with us. And so the ruling
6 with respect to us should be different. So I think that's
7 the way we'll deal with those.

8 With respect to motions *in limine*, my view is that
9 decisions on motions *in limine* -- because those are trial
08:55:03 10 rulings -- those will be made by the transferor court, not
11 by me.

12 *Daubert* and summary judgment, my inclination now is to
13 keep those and make those. But since we're more than a year
14 off, I really don't need to make that decision now, and
08:55:23 15 if -- I mean, I -- and for prior bellwethers, I -- you know,
16 I guess for some I didn't and some I did.

17 So my inclination, I think it's -- I think I had more
18 capacity and experience, and it would be a -- certainly
19 relieve the burden on my four colleagues around the country
08:55:44 20 if I do those with my team. But it's well over a year off,
21 and if I think at that time that it's better to let some or
22 all of them go to the transferor courts, I'll do that.

23 MR. BOONE: Your Honor, this is Brian Boone
24 again for OptumRx.

08:56:07 25 Could we just go back briefly to your prior rulings?

1 And I heard what you said. One of the things that we're
2 struggling with is we haven't been part of the MDL, and we
3 don't know what we don't know, and we understand that there
4 are lots of rulings that are not on the docket.

08:56:23 5 THE COURT: I'm not worried about the
6 discovery rulings, Brian. I'm worried about, you know,
7 rulings on motions to dismiss, or substantive rulings that
8 are published. I'm not expecting you to try and pour
9 through transcripts or millions of orders that aren't
08:56:41 10 published, all right? I can't imagine those are going to be
11 significant.

12 MR. BOONE: Thank you, Your Honor.

13 THE COURT: But I'm talking about the, you
14 know, the published rulings that were made after thorough
08:56:53 15 briefing. Everyone knows what they are.

16 Again, you weren't part of it. So I don't think it's
17 fair for me to say, well, they apply to you, and that's
18 that.

19 But on the other hand, they're there, and I think if
08:57:08 20 the same issue comes up, then you've got a -- you know, you
21 get a crack at showing me why I was wrong a year or two or
22 three years ago, or, of course, to say, well, the facts with
23 respect to us are different, and here's why, and so the
24 rulings should be different because, you know, it's like
08:57:29 25 distinguishing any case.

1 And, again, you know, Special Master Cohen worked
2 through lots and lots of discovery issues. And, again, I
3 mean, the reason why I want the PBMs to think long and hard
4 about, you know, motions to disqualify, is that once you
08:57:51 5 start -- I don't know how to put it -- potentially poisoning
6 the professional relationship among counsel, the whole
7 enterprise deteriorates. And that doesn't benefit anyone.

8 So that's why I want you to think long and hard before
9 going down that road. Because this enterprise has only gone
08:58:18 10 as well as it has because we've had the best lawyers in the
11 country, and they have 99.9 percent of the time worked very
12 well professionally while still vigorously, very vigorously
13 representing their respective clients. And that's the only
14 reason this MDL is still standing. It's not -- you know,
08:58:43 15 yeah, I'll give myself a little credit, and I'll give my
16 team even more credit, but mostly, it's the lawyers. And so
17 I'm just worried about disrupting that.

18 So those were the things I had.

19 Special Master Cohen, did I leave anything important
08:58:59 20 off that you think we should raise?

21 And then, obviously, if the parties have anything that
22 they want to raise, that's fine.

23 SPECIAL MASTER COHEN: I had to take myself
24 off mute.

08:59:16 25 No. I don't think there's anything else. We may have

1 some other discussions with the parties on some fine
2 details, but I think you got the major points.

3 THE COURT: I wanted to cover a few major
4 things.

08:59:28 5 So anything from the two PBMs or the plaintiffs that
6 you want to add or put in?

7 MR. WEINBERGER: Yes. This is Pete Weinberger
8 on behalf of the plaintiffs.

9 But I'll wait for the PBMs, if you want to step in
08:59:47 10 first?

11 MR. BOONE: This is Brian Boone for OptumRx.

12 I don't have anything else today, Your Honor.

13 Thanks.

14 THE COURT: All right. Thank you, Brian.

08:59:59 15 MR. KING: Yes. And this is Patrick King for
16 Express Scripts.

17 I don't believe I have anything else subject to what
18 the plaintiffs may have.

19 THE COURT: Okay.

09:00:07 20 MR. WEINBERGER: Then I'm back on the record.

21 THE COURT: Okay.

22 MR. WEINBERGER: This is Pete Weinberger,
23 again, for the plaintiffs.

24 A couple of things, Your Honor. I take it from your
09:00:14 25 discussion that with the schedule that you laid out,

1 particularly with respect to the motion for leave to file
2 the amended complaint, that we'll then have discussions with
3 Special Master Cohen about, you know, fitting into a CMO the
4 usual scheduling of discovery, et cetera, as opposed to
09:00:41 5 entering that now.

6 THE COURT: Well, I'm not -- I'm going to --
7 I'm going to -- now that we've had this discussion, Pete,
8 I'm going to sit down with Special Master Cohen and my team
9 and see if we can put -- you know, if it makes sense to put
09:00:58 10 some things together now, or I think some may be able to,
11 but some, candidly, are going to wait to see what exactly
12 you're proposing your claims to be and to wait and see what
13 the -- you know, what the PBMs respond.

14 MR. WEINBERGER: Okay. That's --

09:01:16 15 THE COURT: So we're going to -- we're going
16 to start -- we're going to start working and put something
17 together. And I expect there will be something -- something
18 issued. But it certainly -- things may change depending
19 on -- I mean, at this point, no one knows what -- what, if
09:01:36 20 any, additional claims are going to be allowed, all right?

21 I think -- we don't know what claims, additional
22 claims or new claims or substituted claims you're going to
23 propose, and then I don't know what the PBMs are going to
24 say in response and what I'm going to rule.

09:01:54 25 So some of this is still in the air, but I think some

1 things we can probably put in place.

2 MR. WEINBERGER: Understood. Again, Pete
3 Weinberger.

4 What we would like to do to sort of move things along
5 and to ripen any disputes that we may have on discovery is
6 to issue an initial set of interrogatories and request for
7 production of documents.

8 Obviously, under the rules, there's, you know, time to
9 respond. And by the time we get -- you know, we put that
0 together and get it on -- get it over to the defendants, you
1 know, I think we're going to be, you know, well past the
2 time frame for filing a motion for leave and for responses.

13 But we want -- we are working on discovery requests,
14 and we'd like to get them on record so that we can start the
15 process of having the defense look at them, to do a meet and
16 confer with them, and, obviously, some will be subject to
17 how you rule on the amended complaints. But we'd like to
18 issue that, you know, relatively soon and are interested in
19 your feedback on that.

09:03:19 20 THE COURT: Well, I'm curious, Pete, how you
21 can file those before you even file your motion for leave to
22 file amended complaint. Because at the moment -- I mean,
23 the only claims you have are the ones that exist in
24 the complaints that were filed maybe years ago. I haven't
09:03:41 25 even looked at --

1 MR. WEINBERGER: Right.

2 THE COURT: So don't you at least have to
3 file -- I mean, you know, leave to amend with your proposed
4 amended complaints, you can say, look, this is -- these are
09:03:55 5 the claims we're planning to bring -- we want to bring, and
6 maybe then you can propound some discovery. I don't see how
7 you can propound discovery before those are filed.

8 MR. WEINBERGER: Well, that -- well, I mean,
9 as we've indicated, that we're going to get those motions on
09:04:10 10 file by December 15th. And I was -- what I'm suggesting --
11 and maybe I should have been clearer about this -- is that
12 certainly by the end of the year, we can get our basic
13 discovery out. And --

14 THE COURT: All right. Well, I don't have a
09:04:24 15 problem with your -- I mean, unless there's a strong
16 objection, you can propound it, but you've got to, you know,
17 you've got to allow enough time, I mean, because -- you
18 know, it may be that all of the claims you want to bring, I
19 don't allow you to bring. And that may affect the
09:04:41 20 discovery, so . . .

21 But I think some of it is going to be basic enough
22 that it's clearly going to be -- will clearly be necessary.

23 MR. WEINBERGER: Yeah --

24 THE COURT: So I don't have --

25 MR. WEINBERGER: -- that's what I was

1 thinking.

2 THE COURT: So I don't have a -- I don't have
3 a problem with your propounding initial discovery after you
4 file the motion for leave to amend.

09:05:07 5 MR. WEINBERGER: Okay. Thank you.

6 And then one other issue, and it is getting into the
7 weeds a little bit, but as the Court is aware,
8 Special Master Cohen issued discovery ruling 22, and we
9 have been getting documents from Optimum and from Express
09:05:26 10 Scripts per that ruling, principally from litigation that's
11 occurred in Jefferson County, Missouri.

12 We want to remind the defendants on the record that
13 the discovery ruling number 22 is broader than just, you
14 know, private litigation, but encompasses governmental
09:05:51 15 investigations, and specifically, Congressional
16 investigations.

17 And, you know, I think it's public that the PBMs have
18 been subjected to Congressional investigations regarding
19 their practices, and we just want to remind -- and from our
09:06:15 20 review of the documents, we have not been getting any
21 documents associated with those Congressional
22 investigations.

23 I realize that the ruling talks about opioid-related
24 investigations, and -- but the fact is that we believe the
09:06:37 25 investigations that have occurred are broad enough to

1 include opioid -- their conduct vis-à-vis opioid scripts and
2 formularies associated with opioids. And we just wanted to
3 put on the record to remind the defendants that DR22
4 encompasses that.

09:07:02 5 And that's all I have, Your Honor.

6 Thanks.

7 THE COURT: All right. Well, thanks to
8 everyone. Again, I appreciate all the hard work in the
9 respective filings. And it's my job to get these four
09:07:16 10 bellwethers moving forward.

11 And my -- they have a dual purpose. We're getting
12 them ready for trial, so if we need trials, one, two, three,
13 or four, they'll be efficient, productive, and informative.
14 But, of course, I hope that the knowledge that each side
09:07:41 15 gets in the many months ahead might inform the possibility
16 of settlement, which is -- that's why we have these two
17 tracks going simultaneously, litigation and settlement, and
18 it's worked pretty well so far.

19 So I wish everyone a good holiday, and thank you for
09:08:03 20 your input today.

21 MR. WEINBERGER: Thank you, Judge.

22 MR. BOONE: Thank you, Your Honor.

23 - - -

24 (Proceedings adjourned at 9:08 a.m.)

25

C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

/s/ Donnalee Cotone 1st of December, 2023
DONNALEE COTONE, RMR, CRR, CRC DATE
Realtime Systems Administrator